Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1200

ANTHONY T. SANTOS, ANTHONY C. CEPEDA, TITO NAPUTI,
VICENTE M. SANTOS, PEDRO Q. SALAS,
AND JUAN Q. SALAS,

Petitioners,

VS.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Circuit

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Petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Ninth Circuit entered herein on January 4, 1979.

OPINION BELOW

The opinion of the Ninth Circuit, not yet reported is hereto appended. No opinion was rendered by the District Court of Guam.

JURISDICTION

The judgments of the Ninth Circuit were entered on January 4, 1979, and this petition for certiorari is filed within thirty days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the substitution of judges during a criminal trial constitutional?

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

U.S. Const. art. III, § 2, cl. 3

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

U.S. Const. amend. 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fed. R. Crim. P. 25

"(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial

has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

"(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

STATEMENT OF THE CASE

Petitioners were indicted in the District Court of Guam for a number of federal criminal offenses.[1]

"([T]he following proceedings were held at the bench between Court and Counsel, outside the hearing of the jury):

"THE COURT [the Honorable Gordon Thompson, Jr.]: Do you have any objection to the instructions as given?

"MR. KERLEY: No, Your Honor.

". . . .

"MR. MARTIN: No objection, Your Honor.

"THE COURT: Do all of you stipulate that we can send the jury out now?

"MR. PAIK: What is the idea of possibly going . . . late?

[1]Indictment, Record at 1-10.

"THE COURT: That's going to be up to Judge [Cristobal C.] Duenas. I don't know.

"MR. PAIK: He's in town?

"THE COURT: He's in court now.

"MR. KERLEY: Judge Duenas will take the verdict?

"THE COURT: Or I will. Depends on how long the jury deliberates.

"(Whereupon, the following proceedings were held within the hearing of the jury):

". . . .

"All right, Ladies and Gentlemen, with the exception of the alternate juror, you may begin your deliberations.

"(Whereupon, the jury filed into the jury room to begin its deliberations.)

". . . .

"THE COURT: All right. Court is in recess now until we hear from the jury.

"(Whereupon, the court recessed at 1:40 p.m., until 6:15 p.m. of the same day, July 9, 1977.)

". . . .

"(The Honorable Cristobal C. Duenas, Presiding Judge.)

"THE COURT: Ladies and Gentlement of the Jury, first I'd like to introduce myself. I'm Judge Duenas of District Court. I think this is my first opportunity to meet with you. The case had been tried by Judge Thompson who had been here during my absence; and because of pressure of time, he asked me to take over the matter now that I'm back.

"According to Judge Thompson, you convened your session earlier this morning. It has been a long, hard day; and I think it's time that you should take a break. It's time for you to take a recess so that you can have your dinner; and since the Court has determined that there will be no session tomorrow, tomorrow will be off day. The Court feels that it might be necessary to have session right after dinner, maybe, up to 9:00 or 10:00 o'clock tonight; and should you not reach a verdict tonight, then it will be necessary to take a recess until Monday. . . .

". . . .

"THE COURT: I had a discussion with Judge Thompson; and since he was the judge who tried the case, he had the opportunity to observe everything which occurred in the courtroom, both as to the defendants, the jury, the observers; and he was of the opinion that there is no need to sequester the jury; and he made that recommendation to me.

". . . .

". . . [I]t has been decided that the jury will not be sequestered.

"If you have not reached a verdict tonight and before you take your recess, the Court will give you appropriate instructions as to how you should conduct yourselves between now and the next time you will have to appear in Court should that be necessary. . . .

"You will now be taken out to dinner; and once you return after dinner, you will continue your deliberation. And I imagine that Judge Thompson had already given you the caution, the admonition that you should not discuss this case outside of the jury room. . . .

". . . .

"THE COURT: And if there is a need to take a recess until Monday morning, the Court will give you the appropriate caution, the appropriate admonition tonight after you recess.

"You may now leave the Court. Be back after dinner.

"(Whereupon, the jurors filed out of the courtroom for dinner.)

"THE COURT: Court will stand in recess to await the verdict of the jury.

". . . .

("Whereupon, the court was in recess at 2:20 p.m., until 10:10 p.m., of the same day, July 9, 1977.)

". . . .

"THE COURT: The minutes of the Clerk will reflect that all members of the jury are present. Counsel for the parties are present. . . .

". . . .

"THE COURT: All Defendants are present in court.

"Ladies and Gentlemen of the Jury, at this time, if you have not reached any verdict or verdicts with regard to any or all of the Defendants, then it is time for the Court to call a recess. As stated to you earlier, the Court has decided that there will be no sequestration in this particular case; that the Court will allow you to go home during the recess period to be with the members of your immediate family.

". . .

". . . And you will be required by the Court to report Monday, 9:00 o'clock in the morning for the purpose of continuing your deliberation in this case.

". . . .

("Whereupon, the jury left the courtroom.)

"THE COURT: The Court will stand in recess until Monday morning, nine o'clock to await the verdict of the jury."[2]

The jury returned verdicts of guilty,[3] and judgments were entered.[4]

The Ninth Circuit affirmed, holding that "the substitution of Judge Duenas for Judge Thompson after the jury began deliberating, while not in strict compliance with F.R.Crim. P. 25(a), was harmless error."[5]

REASON FOR GRANTING THE WRIT

The Constitutionality Of Substituting Judges During A Criminal Trial Is A Question Which Has Not Been Settled By This Court.

"This is an appeal from an order sustaining a writ of *habeas corpus* and discharging Valante from custody.

"He was tried in the District Court upon a criminal information charging him with misdemeanors under the National Prohibition Act. The judge of another federal district presided. The testimony was heard; and the jury was charged and retired to deliberate. Not having agreed upon a verdict by the time that the judge was to return to his home, it was stipulated by the district attorney and Valante's counsel that any other federal judge might receive the verdict and im-

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[2]Transcript at 2303.15.

[3]Verdicts, Record at 307, 309, 310, 330, 334, and 338.

[4]Judgments and Probation/Commitment Orders, Record at 354, 355, 356, 357, 358, and 360.

[5]Appendix.

pose sentence, if necessary. The jury later returned a verdict of 'guilty.' A judge of the district then presiding received the verdict, and, although his authority so to do was at that time challenged, sentenced Valante to thirty days' imprisonment in the city prison. There was no motion for a new trial or application for a writ of error. Valante was surrendered to the marshal and delivered into the custody of the warden of the prison for the purpose of serving the sentence. He thereupon presented a petition for a writ of *habeas corpus*, alleging that he had been illegally sentenced, in violation of his 'constitutional rights and privileges' in that the verdict was received and sentence imposed by a judge having no jurisdiction. The writ was issued; and upon a hearing on the petition and the return made by the warden, the writ was sustained and Valante was discharged from custody. The United States has appealed directly to this Court. . . .

"Valante's contention is that the constitutional provision that the trial of all crimes shall be by jury (Art. 3, § 2, cl. 3), requires the continuous presence of the same judge throughout the trial until the final judgment, and that, although this was a misdemeanor case, the substitution of another judge before the verdict was received and the sentence imposed, was not a mere irregularity which could be waived by his consent, but a violation of the constitutional provision for a jury trial. Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court or render the judgment void, but was, at the most, one which could have been corrected on a review by writ of error. . . .

"The writ of *habeas corpus* could not be used in this case as a substitute for a writ of error. The order sustaining the writ and discharging Valante from custody

is accordingly reversed; and the cause will be remanded to the District Court with instructions to vacate the order, discharge the writ, and remand Valante to the custody of the warden."[6]

The Constitutionality Of Substituting Judges During A Criminal Trial Is An Important Question Which Should be Settled by This Court.

"Appellant, Frederick Thurman Davis, was convicted of murder in the second degree by a jury in the Circuit Court of the City of St. Louis and was sentenced to imprisonment for a term of fifteen years. Following rendition of judgment and imposition of sentence, an appeal was perfected to the Missouri Court of Appeals, St. Louis District, where the judgment was reversed and the cause remanded. Upon application of respondent, the cause was transferred here by order of this Court.

"The question of general interest or importance is whether, after trial has commenced under one judge who becomes disabled after all the evidence is adduced but before instructions are given, argument is had and verdict returned, another judge may be substituted and preside in his place.

". . . .

"In the federal courts, the problem of a judge's becoming disabled during trial is dealt with by Fed.R. Crim.P. 25(a), which states:

'(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has

[6]United States v. Valante, 264 U.S. 563, 563-65 (1924).

familiarized himself with the record of the trial, may proceed with and finish the trial.'

"In 2 C. Wright, Federal Practice and Procedure § 392 (1969), the status of the law applicable to federal courts is summarized as follows:

'Rule 25(a) is a new provision, added in 1966. It provides that if, during the course of a jury trial, the judge before whom trial is commenced becomes unable to proceed by reason of death, sickness, or other disability, any other judge regularly sitting in or assigned to the court may proceed with and finish the trial upon certifying that he has familiarized himself with the record of the trial.

'The new provision was added in response to a recommendation of the Judicial Conference of the United States, intended to meet the problem of illness or disability of a judge during the trial of a protracted case, a problem thought to have become more acute with the increase in the number of protracted cases.

'Although subdivision (a) serves a useful purpose, it may well be open to constitutional question. Indeed when Rule 25 was originally being formulated the Supreme Court commented adversely on a draft that apparently would have permitted substitution during the trial, asking if it had been considered whether such a rule were constitutional and in any event whether as a matter of policy it should be permitted.

'In a well-known older case, the Second Circuit held that the Constitution does not permit substitution of a judge during a criminal trial even with the consent of the defendant. [*Freeman v. United States,* 227 F. 732 (2d Cir. 1915), modification of mandate denied, 237 F. 815 (1916] It thought that in a criminal case "trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end." And since it thought that defendant is powerless to consent to waiver of jury trial, altogether, he is powerless to waive this element of jury trial. The latter portion of the Second Circuit's reasoning is no longer of force. It is now settled that a defendant may waive jury trial [*Patton v. United States,* 281 U.S. 276 . . . (1930)], and it would seem to follow that he may waive this element of it. Accordingly Rule 25(a) poses no substantial constitutional problem if the defendant consents to substitution of judges during trial. The reasoning of the Second Circuit still has vitality if defendant does not consent. In the absence of consent, it would seem that Rule 25(a) cannot be validly applied, and that the death or disability of the judge requires that a mistrial be granted.'

"No Missouri case has decided the issue of whether, in a criminal cause, a new judge may be substituted for a judge who becomes disabled after evidence has been presented but before instructions have been given and final arguments had. Cases in other jurisdictions have held it is reversible error to substitute a judge at a similar point in a trial without the consent of the defendant. *Commonwealth v. Claney,* 113 Pa.Super. 439, 173 A. 840 (1934); *Mason v. Ohio,* 28 C.D. 203, 26 Ohio C.C. 535 (1904); *Durden v. People,* 192 Ill. 493, 61 N.E. 317 (1901). We are unable to find any state court case approving of such a substitution. We decline at this time to adopt a rule of practice comparable to Fed.R.Crim. P. 25(a). We invite comments from the Bench and Bar

as to whether a comparable rule should be made a part of our Rules of Criminal Procedure. . . .

"The judgment is reversed and the cause remanded.'"

"The only authority cited by the defendants for the proposition that, irrespective of whether the defense was prejudiced, an unconsented-to substitution of one judge for another violates the sixth amendment, is our court's opinion in Freeman v. United States, 227 F. 732 (2 Cir. 1915). We are not bound by the holding there for, that case, decided over fifty-five years ago, rested on a principle subsequently repudiated by the United States Supreme Court in Patton v. United States, 281 U.S. 276 . . . (1930)—the principle that a defendant may not waive his right to a jury trial.'"[8]

"On July 15, 1964, the district court granted Dennis Randel's application to proceed in forma pauperis, and directed the Clerk to file his petition for habeas corpus. . . .

"As ground for relief Randel alleged that he was denied due process of law because of a substitution of judges during the taking of testimony upon his trial for murder. . . .

"The district court took the position that it appeared from the petition that Randel was not entitled to issuance of the writ of habeas corpus or to a show cause order. . . .

". . . .

"The facts as averred in Randel's petition for habeas corpus, and as further disclosed in the opinion of the Court of Criminal Appeals of Texas, pose for decision

[7]State v. Davis, 564 S.W.2d 876, 877-79 (Mo. 1978).

[8]United States v. LaSorsa, 480 F.2d 522, 531 (2d Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

important questions of constitutional law, such as:

". . . .

"2. Does the substitution of Judges in this case violate Randel's federal constitutional right to a jury trial?

"If the guaranty of a jury trial is applicable to the States by reason of the Fourteenth Amendment, a stricter test than the fundamental conception of a fair trial guaranteed by due process must be applied. The States would have to observe the same stringent requirements as to substitution of Judges applicable to federal criminal trials.

". . . .

"The questions which we have posed are merely suggestive of some of the serious constitutional problems created by the substitution of Judges under the circumstances of this case. . . .

"The district court erred in denying the petition without a hearing.'"[9]

"[W]e hold that . . . the right to a jury trial, including the right to have the same judge proceed throughout the trial, [is] preserved by Article III, Section 2 of the Constitution. . . .'"[10]

"The most important question presented, and in fact the only remaining question we find it necessary to pass upon, is whether the defendant has been convicted of the crimes for which he was tried in a manner which the law of the land sanctions. It is claimed on his behalf that under the Constitution of the United States a trial by jury is guaranteed to him, and that he had

[9]Randel v. Beto, 354 F.2d 496, 500-03 (5th Cir. 1965) (footnote omitted), *cert. denied*, 387 U.S. 935 (1967).

[10]Simons v. United States, 119 F.2d 539, 544 (9th Cir. 1941), *cert. denied*, 314 U.S. 616 (1941).

not had such a trial, because of the substitution of one judge for another during the trial. . . .

". . . .

"It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. . . . The continuous presence of the same judge and jury is equally essential throughout the whole of the trial."[11]

Comprised In The Question Presented For Review Is The Subsidiary Question Of Whether The Right To Have The Same Judge Proceed Throughout A Criminal Trial Is So Basic To A Fair Trial That Its Infraction Can Never Be Treated As Harmless Error.

"The next assignment of error is grounded upon a rarely encountered occurrence. After the close of the evidence, the trial at that point having lasted five days, the trial judge became ill. He inquired of all trial counsel if there were any objections to allowing the magistrate to sit during the scheduled four hours of argument to the jury, so as to avoid delaying the trial. The defendants were not informed by the Court of their right under the Rule to have a judge preside over the argument and, of course, they did not personally say that they would waive that right. The attorneys, however, stated that there was no objection. The magistrate introduced himself to the jury and explained the reason for his presiding in the absence of the judge. The defense offered no objection at that point or at any other time until after the guilty verdicts were returned. At the close of argument the

[11]Freeman v. United States, 227 F. 732, 741-60 (2d Cir. 1915).

judge was able to take the bench and to instruct the jury, thereafter presiding for the remainder of the trial.

"The defendants correctly argue that the substitution of the magistrate did not comply with the mandate of Rule 25(a) of the Federal Rules of Criminal Procedure . . . .

"The defendants say, and it is no doubt so, that the magistrate was neither a 'judge regularly sitting in or assigned to the court' nor familiar with the record of the trial.

". . . .

". . . Without deciding whether the occurrence was an invasion of a constitutionally guaranteed right, and without deciding whether the defendants were required in the circumstances to *personally* enter an intelligent waiver, our evaluation of the record is that they could not have been prejudiced by what took place. . . .

". . . .

"We find nothing prejudicial in the situation now under consideration. We do not intend to leave the impression that we look with approval upon a failure to conform to Rule 25(a). Our decision applies to this case only, and to what actually happened here. We must hold that beyond a reasonable doubt lack of conformity in this instance was harmless error."[12]

[12]United States v. Boswell, 565 F.2d 1338, 1341-42 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978) (No. 77-1466).

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the Ninth Circuit.

Dated, Agana, Guam,
January 25, 1979.

Respectfully submitted,

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(Appendix Follows)

Appendices

APPENDIX

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee, v. Anthony T. Santos, Anthony C. Cepeda, Tito Naputi, David Lujan, Vicente M. Santos, Pedro Q. Salas, Juan Q. Salas, Defendants-Appellants.	Nos. 77-3018, 77-3019, 77-3020, 77-3021, 77-3022, 77-3105, 77-3106

[Filed January 4, 1979]
Appeal from the United States District Court
For the District of Guam

OPINION

Before: BROWNING and ANDERSON, Circuit Judges, and WATERS,* District Judge

PER CURIAM:

Appellants, correctional officers and supervisors at the Guam Territorial Prison, were convicted of depriving certain prisoners of their civil rights in violation of 18 U.S.C. § 242 and of being accessories after the fact, 18 U.S.C. §3. Appellants were sentenced and then filed timely notices of appeal.

The facts of this case are in some dispute but may be summarized as follows. On Sunday morning, February 29,

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

1976, eleven prisoners at the Guam Penitentiary refused to immediately return to their cells after religious services. These prisoners then barricaded themselves in the "North Dormitory" of the prison for several hours. The "demonstration" was a peaceful one up to this time.

Appellant Lujan, Deputy Director at the penitentiary, then called a meeting of the prison guards. The meeting was delayed for a period of time while other off-duty guards could be called in. Some of the off-duty guards may have been drinking prior to their arrival at the prison. At the meeting, Lujan directed the guards to return the prisoners to their cells, and to use force if necessary. Prison guard Payton testified that at least one of the other guards was very angry and had exhorted his fellow guards in obscene language to "get [those prisoners]."

After the meeting, a group of about 15 guards then went to the North Dormitory. Defendant Joaquin Baza conversed with the inmate spokesman, William Garrard. As a result of this discussion, the inmates agreed to peacefully return to their cells in exchange for the opportunity to meet with Deputy Director Lujan the following Tuesday to discuss their grievances. The evidence indicated that none of the prisoners then exhibited any sign of injury.

There is some disagreement about what occurred next. The United States offered the testimony of witnesses who stated that, after the prisoners had returned to their cells, some of the guards then went from cell to cell assaulting and seriously injuring eight inmates. Appellants, on the other hand, offered testimony to the effect that any injuries suffered by inmates were the result of the guards having to defend themselves from attacks by the inmates.

Appellants raise several issues on this appeal; however, only two of them require any extended analysis. Appellants Tito Naputi, Anthony C. Cepeda, Vicente M. Santos, Anthony T. Santos, and Juan Q. Salas first argue that the district court erred in denying their motion to dismiss the indictment on the grounds of prejudicial pre-trial and pre-indictment delay. These appellants assert that the total pre-trial delay involved in this case was fifteen months, that is, the period of time which elapsed from the date of the first indictment[1] (March 18, 1976) to the date trial commenced (June 29, 1977). Additionally, all appellants assert that they were deprived of due process of law as a result of the delay between the alleged beatings and the date of the second indictment.

The United States Supreme Court has held that a defendant's right to a speedy trial under the Sixth Amendment begins to run when the defendant is indicted or formally charged with an offense. *United States v. Marion*, 404 U.S. 307, 313 (1971). After a defendant has been in dicted, the United States must move promptly to bring him to trial. However, dismissal of an indictment is not automatic if an accused is not immediately brought to trial. Rather, a court must examine an assertion of a denial of the right to a speedy trial with the reference to four factors: 1) the length of the delay; 2) the reason for the delay;

[1]The first indictment in this case, which named Anthony T. Santos, Vicente M. Santos, Anthony C. Cepeda, Joseph M. Naputi, Tito Naputi, Juan Q. Salas, Pedro Q. Salas, Joaquin Baza and David Lujan, was dismissed by the district court on June 15, 1976. During the next eight months, there was no indictment outstanding, but the United States conceded during oral argument that there was an ongoing investigation. The second indictment was returned February 4, 1977.

3) the defendant's assertion of his right to a speedy trial; and 4) the resulting prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Initially, this court acknowledges that appellants asserted their right to a speedy trial by filing their April 20, 1977 motion to dismiss the indictment. Furthermore, this court is not impressed by the government's excuse (the "disastrous typhoon") for its delay in indicting this case and moving it to trial.

As to the first *Barker* criterion, there appears to be some support for appellants' position that the total amount of pre-trial delay amounted to some 15 months. *See United States v. Merrick*, 464 F.2d 1087 (10th Cir. 1972). But there is no need for this court to choose between the reasoning of the *Merrick* decision and that of other courts which have held that the period of time between dismissal of a first indictment and the filing of a second is to be disregarded in applying the *Barker* test. *See, e.g., United States v. Davis*, 487 F.2d 112 (5th Cir. 1973). Whichever standard is applied, it is clear that appellants did not suffer undue prejudice by the pre-trial delay in this case.

The witness who died, Galo Basalotte, was an alleged victim of appellants' beatings. It is doubtful that his testimony would have assisted appellants. And while it is true that the alleged "weapons" (e.g. broomstick handles) used by the prisoners were lost, photographic evidence of these implements was introduced at trial. Finally, appellants' mere speculation that they were prejudiced by the unavailability of the testimony of witnesses who appeared before the March, 1976, grand jury is not enough to require reversal. Appellants had access to all other prior statements

of these witnesses in advance of trial, and appellants have failed to point to any inconsistencies between these statements and the testimony elicited at trial.

Similarly, there is no merit to appellants' contention that the delay prior to the second indictment deprived them of due process of law. In applying the balancing approach articulated by this court in *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977), we conclude that the eleven month pre-indictment delay was not unduly prejudicial to appellants.

Appellants next assert that the trial court erred in denying a motion to dismiss the indictment on the grounds that the panel from which the grand and petit juries were chosen was not in substantial compliance with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* [the Act]. This motion was made 25 days after appellants' counsel had been granted access to the jury selection records.

28 U.S.C. § 1867(a) requires that a motion to dismiss an indictment on the basis of failure to comply with the Act shall be made within seven days after a defendant discovers or should have discovered, by the exercise of diligence, the grounds for the motion. Here, the trial court, by ruling on the merits of the motion, implicitly held that counsel exercised the requisite diligence in filing the motion. We find no fault with such a determination.

We also agree with the district court's decision that the jury selection procedures employed in the District of Guam are in substantial compliance with the Act. Since this court's holding in *United States v. Okiyama* 521 F.2d 601 (9th Cir. 1975), that the District of Guam was not in compliance with the provisions of the Act, important changes

have been implemented. The jury questionnaires now specifically ask each prospective juror whether he or she can read, speak and understand English. If this question is answered affirmatively, and the form of the answers as a whole indicates an ability to understand English, no further questions are asked of that juror. If the prospective juror answers that he or she cannot understand English, that person is then examined by the district court. Minor ambiguities or inconsequential omissions are disregarded as *de minimus*. Thus, unlike the questionnaires in *Okiyama*, the district court here had sufficient information from which to determine the English language proficiency of the prospective jurors. Additionally, all decisions as to disqualification are now made by the district court.

Appellants contend that the fact that no "follow-up" was made as to the 38 questionnaires not returned to the clerk of the court also constitutes non-compliance with the Act. We are not persuaded. 28 U.S.C. § 1864(a) clearly provides for discretionary follow-up by the clerk or jury commission for failure to return the jury qualification form. Here, the clerk apparently believed that an 87% response to the questionnaires was sufficient. We do not disagree.

Finally, there is no merit to appellants' assertion that the jury selection process in Guam does not result in juries representing a "fair cross section of the community." *See* 28 U.S.C. § 1861. Appellants have not met their burden of showing "systematic exclusion of [an] identifiable group within the community." *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971). Indeed, appellants have not even identified which groups have allegedly been excluded by Guam's jury selection system.

Appellants' other arguments merit brief comment only. The substitution of Judge Duenas for Judge Thompson after the jury began deliberating, while not in strict compliance with F.R.Crim.P. 25(a), was harmless error. Appellants have not indicated that they suffered any prejudice by the substitution, and our review of the record reveals none. *See United States v. Boswell*, 565 F.2d 1338 (5th Cir. 1978). If a substitution of judges does become necessary, the "new" judge should certify that he has familiarized himself with the record of the trial.

There was no abuse of discretion in the district court's decision to deny appellants a bill of particulars. See *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963). Nor was it error for the district court to deny substitute counsel for Anthony T. Santos additional time to prepare for trial. *See Eubanks v. United States*, 336 F.2d 269 (9th Cir. 1964). Counsel had at least two weeks to prepare for trial and was not precluded from consulting with other defense counsel after he was appointed.

Finally, appellants David Lujan, Pedro Q. Salas and Anthony T. Santos argue that the evidence was insufficient to convict them. We have carefully reviewed the record in this case, with specific reference to the portions of the transcript noted by appellants. After examining this record in a light favorable to the Government, *Hamling v. United States*, 418 U.S. 87, 124 (1974), we conclude that the evidence was sufficient to sustain the convictions.

The judgments of conviction as to all appellants are affirmed.

Supreme Court, U. S.
FILED
MAR 26 1979
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No. 78-1200

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY T. SANTOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 588 F. 2d 1300.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1979. The petition for a writ of certiorari was filed on February 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the substitution of one district judge for another, after the jury had begun to deliberate, violated petitioners' constitutional right to a trial by jury and requires reversal of their convictions, even though petitioners did not object to the substitution and have not shown any prejudice resulting from it.

STATEMENT

After a jury trial in the District Court of Guam, petitioners were convicted of depriving certain inhabitants of the Territory of Guam of their civil rights, in violation of 18 U.S.C. 242 (Pet. App. A-1).[1] The evidence at trial showed that petitioners, correctional officers and supervisors at the Guam Territorial Prison, assaulted and seriously injured eight prisoners on February 29, 1976, after the prisoners had engaged in a brief, peaceful demonstration to protest their grievances (Pet. App. A-1 to A-2).

The indictment was returned on February 4, 1977. Judge Cristobal C. Duenas, the judge regularly assigned to the District of Guam, heard and decided petitioners' pretrial motions. However, Judge Duenas was absent when trial commenced on June 29, 1977, and accordingly Judge Gordon Thompson, Jr., of the United States District Court for the Southern District of California presided over petitioners' trial. After both sides had presented their evidence and delivered closing arguments, and after the jury had deliberated for several hours, Judge Duenas returned and took control of the case (IX Tr. 2308).[2] Petitioners voiced no objection to this substitution. Judge Thompson then left Guam.

Judge Duenas excused the jury in the evenings, reconvened court in the mornings, received the verdicts, and entered orders of discharge and orders specifying the conditions of release following the verdicts (IX Tr. 2303; X Tr. 2337). He also sentenced petitioners (X Tr. 2338-2367). Judge Duenas' only ruling during trial that required the exercise of discretion was his decision not to

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[1]The sentences imposed on petitioners are set forth at X Tr. 2359-2367.

[2]Judge Duenas did not certify that he had become familiar with the record in the case. See Fed. R. Crim. P. 25(a).

sequester the jury, and this decision was made upon the advice of Judge Thompson and without the objection of any party (IX Tr. 2309-2310).

The court of appeals affirmed. Although the court agreed that the substitution of Judge Duenas for Judge Thompson after the jury had begun its deliberations was not in strict compliance with Fed. R. Crim. P. 25(a), it concluded that the error was harmless in light of petitioners' failure to claim that they suffered any prejudice and the court's independent determination that the record revealed no prejudice (Pet. App. A-7).

ARGUMENT

Petitioners do not contend that Judge Duenas' failure to follow the procedures established by Rule 25(a) entitles them to a new trial. Rather, they apparently argue in this Court that the substitution of judges at any stage of a criminal trial is *per se* unconstitutional and can never be harmless error.

There is little support for the proposition that a defendant has a non-waivable federal constitutional right to have the same judge preside over the jury at every stage of his criminal trial, from voir dire to verdict, much less that every violation of that "right" requires the reversal of a conviction. *Freeman* v. *United States*, 227 F. 732 (2d Cir. 1915), the only federal case cited by petitioners in which a criminal conviction was set aside because of a substitution of judges, has since been questioned by the Second Circuit (see *United States* v. *LaSorsa*, 480 F. 2d 522, 531, cert. denied, 414 U.S. 855 (1973)), and its holding is suspect because it rested in large part on the assumption, subsequently repudiated in *Patton* v. *United States*, 281 U.S. 276 (1930), that a defendant could not waive his right to a jury trial (see 227 F. at 744). See *United States* v. *Boswell*, 565 F. 2d 1338, 1341-1342 (5th Cir. 1978), cert. denied, No. 77-1466 (Oct. 2, 1978); *Simons* v. *United States*, 119 F. 2d 539, 543-544 (9th Cir.), cert. denied, 314 U.S. 616 (1941).

Moreover, *Freeman* is distinguishable on its facts. There, a new trial judge was substituted after the government had presented 106 witnesses and before the defense had begun to put on its evidence. The court of appeals noted that the new judge had not heard all the evidence that the jury had heard and had even told the jury that he was unable to furnish necessary guidance concerning the testimony of witnesses who had appeared prior to his taking the bench (227 F. at 759).[3]

To the extent that the right to a jury trial includes the right to have the same judge preside over the jury, it rests on the need to have a judge familiar enough with the case "to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899). Unless the substitution of a judge inhibits in some way the exercise of the judge's duty relative to the jury's function, there is no basis to conclude that any aspect of the right to a jury trial has been impaired. Here, the perfunctory actions taken by Judge Duenas at the final stages of the trial were not of that kind. Except on those occasions when the jury requires further guidance during its deliberations, a contingency that did not arise in this case, a judge is not needed at all after the jury has retired to consider its verdict.[4] The functions actually

[3]The other cases cited by petitioners are not on point. *Randel* v. *Beto*, 354 F. 2d 496 (5th Cir. 1965), cert. denied, 387 U.S. 935 (1967), held only that the district court erred in not conducting a hearing on a habeas corpus petition raising the question of waiver of the right to object to a substitution of judges. *State* v. *Davis*, 564 S.W.2d 876 (Mo. Sup. Ct. 1978), discusses the state law governing the substitution of a judge prior to final arguments and instructions to the jury. In *United States* v. *Valante*, 264 U.S. 563 (1924), this Court expressly declined to hold that the substitution of a new trial judge before verdict violated the Constitution.

[4]A judge's absence for a brief period during trial when his presence was not actually needed has not been held to require the reversal of a

district or otherwise, a judge is unable to perform his

performed by Judge Duenas prior to the verdicts could have been performed as easily by the court clerk or bailiff. Following the verdicts, there were no post-trial motions to decide, and all that remained of a judicial character was the imposition of sentence.

Hence, in all material respects, this case resembles those in which the trial judge was substituted after verdict. It is well established that if, because of absence from the duties after a trial, a new judge may be assigned to the case, providing that the substituted judge acts with knowledge of relevant information. See *United States* v. *Bowser*, 497 F. 2d 1017, 1019 n.2a (4th Cir.), cert. denied, 419 U.S. 857 (1974); *United States* v. *Lewis*, 460 F. 2d 257, 258 (9th Cir. 1972); *United States* v. *Bakewell*, 430 F. 2d 721, 722 (5th Cir.), cert. denied, 400 U.S. 964 (1970); *Rogers* v. *United States*, 350 F. 2d 297, 298 (10th Cir. 1965); *Owens* v. *Hunter*, 169 F. 2d 971, 972 (10th Cir. 1948); cf. *Cahill* v. *Mayflower Bus Lines, Inc.*, 77 F. 2d 838, 839-840 (2d Cir.), cert. denied, 296 U.S. 629 (1935).

Rule 25(b), Fed. R. Crim. P., expressly permits such substitutions, which have been held to satisfy the requirements of the Due Process Clause. *United States* v. *McCallie*, 554 F. 2d 770, 773-774 (6th Cir. 1977); *Connelly* v. *United States*, 249 F. 2d 576, 580 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958). See also *Simons* v. *United States, supra*, 119 F. 2d at 544-545. The situation involved here—a visiting judge who found it necessary to leave the district—is one of the reasons that Rule 25(b) was

conviction. See, *e.g.*, *United States* v. *Pfingst*, 477 F. 2d 177, 195-197 (2d Cir.), cert. denied, 412 U.S. 941 (1973) (absence causing delay in answering jury's question); *Haith* v. *United States*, 342 F. 2d 158, 159 (3d Cir. 1965) (absence during jury voir dire); *Heflin* v. *United States*, 125 F. 2d 700 (5th Cir.), cert. denied, 316 U.S. 687 (1942) (absence during defense counsel's closing argument).

promulgated,[5] and petitioners do not suggest that Judge Duenas departed in any way from the procedures established by this rule.

In sum, the substitution of Judge Duenas for Judge Thompson during the jury's deliberations could not possibly have affected the verdicts. Cf. *Chapman* v. *California*, 386 U.S. 18 (1967). Petitioners have not indicated how they were prejudiced by these events. Even assuming that they are entitled to maintain this claim on appeal despite their failure to present a contemporaneous objection (see *Estelle* v. *Williams*, 425 U.S. 501, 512-513 (1976)), petitioners were not deprived of a fair trial. See *United States* v. *LaSorsa, supra*, 480 F. 2d at 531.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]See 2 C. Wright, *Federal Practice and Procedure* §393 (1969); 8A *Moore's Federal Practice* para. 25.04[1] (2d ed. 1978).

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